

Testimony of Commissioner Dorothy L. McMath:

San Francisco Conservatorship Procedures

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A. Temporary Conservatorships. Probate Code Sec 2250-2258.¹

1. **Purpose.** When a petition is filed for appointment of a conservator, the petition is set for hearing in approximately 2 months. If action needs to be taken immediately to protect the conservatee, either personally or financially, the petitioner for appointment as conservator can also request appointment as temporary conservator to act until the general appointment is granted.

2. **Procedure.**

a. **Notice.** Petitioner sets the petition for hearing on the Probate Department's ex parte calendar, heard daily between 11:00 and 12:00. At least 5 days before the calendared date and time, proposed conservatee must be personally served with notice and with a copy of the petition for temporary conservatorship. Sec 2250. Relatives to the second degree must be given 24 hours telephonic or FAX notice of the hearing. Petitioner must submit a declaration stating to whom notice was given, when notice was given and the method of notice. San Francisco County Superior Court Rules Rule 14.91.

The Court can dispense with notice for good cause. Sec 2250. An example of good cause would be where notice to the conservatee would also notify an alleged abuser who might abscond with conservatee's assets or with the conservatee before a temporary conservator could be appointed. An allegation that the conservatee would not understand the proceeding is not good cause.

b. **Hearing.** Petitioner, proposed conservator if not the petitioner, and counsel if any must appear. San Francisco County Superior Court Rules Rule 14.91. Conservatee may appear but is not required to appear if conservatee received proper notice.

¹ All statutory references are to the California Probate Code.

All parties meet with the Probate Staff Attorney for an unreported hearing. The Staff Attorney then briefs a judicial officer on the petition and any objections. If the judicial officer is satisfied that the temporary appointment is necessary to protect the conservatee until the hearing on the general appointment, the judicial officer signs the order appointing temporary conservator. The temporary appointment expires on the date of the general hearing.

A hotly contested or otherwise sensitive temporary petition may be heard by the judicial officer on the record.

c. **Appointment of counsel for conservatee.**

(1) **Mandatory appointment.** The Court cannot grant authorization to place the conservatee in a secured facility or to administer medications for dementia unless conservatee has counsel. Sec 2356.5. If dementia medication or secured placement is requested on a temporary petition, the petitioner may request appointment of counsel before the temporary hearing.

(2) **Discretionary appointment.**

(a) **Change of residence.** A temporary conservator may not change the residence of a temporary conservatee without a hearing at which the conservatee is entitled to counsel. Sec 2253. Although the Court may direct the Court Investigator to interview and advise the proposed conservatee regarding the proposed move, generally there is not sufficient time for an Investigator's report before the temporary hearing. San Francisco policy is to appoint counsel for a temporary conservatee before authorizing a change of residence of a proposed conservatee.

(b) **Contest.** A contested temporary hearing often alerts the Court to the need for independent counsel for the conservatee. San Francisco practice is to appoint counsel for the conservatee immediately.

3. **Conclusion of temporary conservatorship.** A temporary conservatorship terminates upon the appointment of a general conservator or upon the withdrawal of the petition for appointment of a general conservator. A temporary conservator of the estate must file an accounting within 90 days after appointment of a general conservator. Sec 2256. If a temporary conservator withdraws his or her petition for general appointment, or if someone other than the temporary conservator is appointed general conservator, San Francisco practice is to set a status date for the former temporary conservator to file a first and final accounting.

B. General Conservatorships

1. Establishment

a. **Preappointment.** San Francisco sets the hearing on the petition for appointment approximately 2 months after petition is filed. During this interval, a Court Investigator will interview the conservatee and other interested persons and will submit a detailed report to the court. If the Court Investigator believes that appointment of counsel would be “helpful to the resolution of the matter or is necessary to protect the person’s interests,” the Court will appoint counsel for the conservatee. Sec 1470. If the conservatee requests counsel, if the petition is for appointment of a limited conservator, or if the conservator is requesting authorization to administer dementia medication or to place the conservatee in a secured placement, the Court must appoint counsel for the conservatee. Sec 1471, Sec 2356.5.

b. **Notice.** Citation and copy of the petition must be personally served on conservatee. Sec 1824. Notice of hearing and copy of the petition must be mailed to conservatee's relatives to the second degree, the Veteran's Administration if the conservatee is receiving Veteran's benefits, the Regional Center if the conservatee is a developmentally disabled adult, and in some cases to the State Department of Mental Health or State Department of Developmental Services. Sec 1822.

c. **Appearances at Hearing.**

(1) **Conservatee.** Except in three situations, the proposed conservatee must be produced at the hearing. Exceptions are: Conservatee is out of state when served and is not the petitioner; conservatee is medically unable to appear and a physician or licensed psychologist completes a declaration describing the disability; or the proposed conservatee tells the Court Investigator that he or she does not want to attend the hearing. Sec 1825. The Court Investigator's report quotes the conservatee's statement regarding his or her wish to attend. Sec 1826. San Francisco policy requires strict compliance. An allegation that the conservatee would not understand the proceedings is not sufficient to excuse the conservatee's appearance. If the conservatee does not specifically state unwillingness to attend, and the doctor's declaration does not support medical inability, the Court will require the conservatee's attendance and will continue the hearing if the conservatee is not present. The court may make an exception, however, if the conservatee is represented by court-appointed counsel who reports that the conservatee in a recent interview told counsel that he or she did not want

to attend the hearing. The Court may accept counsel's request to waive the conservatee's appearance.

(2) **Conservator.** San Francisco requires all proposed conservators to appear at the appointment hearing. Before the hearing begins, nonprofessional conservators are required to watch a video prepared by the Alameda County Bar Association to help conservators understand their duties.

d. **Bond.** Sec 2320 requires the Court to set bond of conservator of the estate in the amount of personal property plus estimated gross annual income. The Court may reduce or waive bond for good cause or if the conservatee "having sufficient capacity to do so," waives bond. Sec 2321. San Francisco policy is to require full bond in nearly all cases. The Court will not reduce or dispense with bond on waiver of the conservatee unless the conservatee nominated the proposed conservator and waived bond at a point in time well before the conservatorship proceeding when the conservatee clearly had capacity. If the conservatorship estate includes real property, San Francisco policy is not to grant the conservator the power to sell the property without court confirmation. At the confirmation hearing, the Court can increase bond to cover cash realized from the sale

e. **Court appointed Counsel.**

(1) **Circumstances in which Court appoints counsel.** Mandatory appointment is discussed above. The Court makes discretionary appointments when the conservatee is opposed to the conservatorship or when family discord indicates that the conservatee needs independent representation. Often the Court Investigator will bring the need for counsel to the attention of the Court.

(2) **Role of Court appointed Counsel.** “Court appointed attorneys are expected to inform the Court of the wishes, desires, concerns, and objections, of the (proposed) conservatee. If asked by the Court, the attorney may give his or her opinion as to the best interests of the (proposed) conservatee.” San Francisco Superior Court Rules Rule 14.93.U.4.

Court appointed attorneys have a difficult role. The conservatee is the client, and the attorney must represent his or her client’s position as competently as possible. On the other hand, an aggressive litigation approach to oppose a clearly needed conservatorship may not be in the client’s best interest. The San Francisco Probate Department relies heavily on court-appointed counsel to help parties, such as contentious families and conservatees opposed to the appointment of a conservator, find alternatives that will protect the conservatee’s interest while maintaining the maximum independence and privacy of the conservatee and will relieve mistrust among family members. Alternatives may include creating a trust if the conservatee has capacity or bringing an existing trust under court supervision, finding another conservator who is acceptable to the conservatee and to family, or preserving some independent power of the conservatee such as management of an allowance or separate checking account.

In addition to representation in the appointment procedure, the Court may authorize appointed counsel to assist in estate planning for the conservatee.

2. **Monitoring established conservatorships**

a. **Status dates.** San Francisco orders appointing conservator include an attachment setting dates for subsequent filings. (See attached sample.) These dates are calendared in the Court's computer system. When a Probate Examiner reviews files for the calendared date, the Examiner will take the status date off calendar if the required document has been filed. If the document has not been filed, the matter will be on calendar for hearing. If the conservator does not appear at the hearing and has not filed the required document, the Court will issue an order to show cause requiring the conservator to appear to show why the conservator should not be removed or his or her powers suspended.

b. **Periodic Accountings and Court Investigator Visits.** The conservator's first accounting is due one year after appointment, then biennially. Sec 2620. Court Investigators are required to make their first review visit after one year and then biennially. Sec 1850. As described above, the date for filing of the conservator's first accounting is set at the time the conservator is appointed. When each accounting is approved, the order sets a date for filing of the next accounting.

San Francisco staff coordinates the hearing date for the accounting with the investigator's visit so that the file examiner has the investigator's report when he or she reviews the accounting, and the investigator has the accounting when he or she visits the conservatee. This cross reference enables the investigator to detect inconsistencies such as major property repairs, clothing purchases, or auto or utility costs reported in the accounting but not evident in the conservatee's home or care facility and informs the

examiner of care problems reported by the investigator but not evident in the conservator's accounting.

3. **Addressing problem conservatorships.**

In addition to identifying problems in their periodic visits, San Francisco Court Investigators are available to receive phone calls or letters reporting problems. The Department Director has an open phone line and receives many such reports. Options for response may include setting a matter on a Court calendar for status, the Court Investigator making a visit in addition to the regularly scheduled periodic visit, or appointing counsel for a conservatee.

The order appointing counsel in a problem conservatorship may authorize counsel to take action, such as filing a petition to remove the conservator if counsel determines such action to be appropriate. On a several occasions the Court directed appointed counsel to prepare an accounting when the conservator was unable or unwilling to do so. The cost of such accounting was surcharged against the conservator.

Case No. _____

Attachment to Order – Future Filing Dates

It is further ordered that the following documents shall be filed two weeks before the date indicated:

1. Inventory², General Plan³, and Proof of Payment of the Assessment Fee⁴:

_____.

2. First Accounting⁵ and Status Report⁶: _____.

3. Proof of recording of letters of conservatorship⁷ (if the estate includes real property): _____.

The Court further orders:

4. Certificate of Completion of the Conservatorship class shall be filed by

_____.⁸

5. The Assessment Fee is \$ _____.

Dated: _____

Judicial Officer

² Probate Code Secs. 2610, *et seq.*

³ San Francisco Superior Court Uniform Local Rules of Court Sec. 14.93(J)(2)

⁴ San Francisco Superior Court Uniform Local Rules of Court Sec. 14.93(N)

⁵ Probate Code Secs. 2620, *et seq.*

⁶ San Francisco Superior Court Uniform Local Rules of Court Sec. 14.93(J)(4)

⁷ Probate Code Sec. 2313

⁸ San Francisco Superior Court Uniform Local Rules of Court Sec. 14.93(B)(1)

CONCERNS AND SUGGESTIONS

The conservatorship process is a delicate balance between protecting vulnerable individuals from abuse or from their own disabilities, and respecting the same individuals' privacy, independence and dignity. The public nature of the court process is necessary but invasive. The Legislature and the courts must constantly weigh competing factors. For example, family members may be the best source of information regarding the conservatee's assets and wishes, or family members may be the very group with which the conservatee has the least connection and against whom the conservatee may for good reason have the most suspicion. Family members can be sources of support or sources of abuse. In considering improvements to the conservatorship process, decision makers should not allow their concern for protection to overshadow conservatees' rights to privacy and maximum independence.

Over the years, the Legislature has developed a remarkable system to enable courts to protect vulnerable individuals. Most of the practices of the San Francisco Probate Department are measures that enforce existing Probate Code protections; for example, requiring adequate bond, protecting conservatee's right to appear at appointment hearings, appointing counsel where mandated or helpful, setting status dates for inventories, accounting, recording of letters of conservatorship, and thorough account examinations and preappointment and review investigations by highly qualified and

trained examiners and investigators. The Task Force has a wonderful opportunity to encourage the State of California to provide funding for staff and education for all courts to implement existing statutes.

Bio Statement

Dorothy L. McMath is a commissioner in the Probate Department of the San Francisco Superior Court. She is the judicial officer who hears most of the petitions for appointment or removal of conservator. She is one of two judicial officers who hear other conservatorship matters, such as petitions for approval of accounting. She joined the San Francisco Probate Department in 1998 after three years as the Probate Commissioner and ten years as the Probate Attorney for the Contra Costa Superior Court.

Commissioner McMath is a member of the Probate and Mental Health Advisory Committee of the Judicial Council of California and serves as the Chair of the Forms Subcommittee of the Advisory Committee. She is a member of the Probate and Mental Health Committee of the California Judges Association and is a member of the National College of Probate Judges. She has served on the faculties of the California Center for Judicial Education and Research and of the Rutter Group Continuing Legal Education as an instructor for probate, trust, conservatorship and mental health programs.